THE UNITED STATES, PLAINTIFF v. JOHN BAILEY.

Kentucky. Indictment for false swearing, under the third section of the act of congress of March 1, 1823, which declares that "any person who shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, shall suffer as for wilful and corrupt perjury."

The indictment charged the false swearing to be an affidavit made before a justice of the peace of Kentucky, in support of a claim against the United States, under the act of congress of July 1832, to provide for liquidating and paying certain claims of the state of Virginia.

There is no statute of the United States which expressly authorizes any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823.

The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation authorising affidavits made before any justice of the peace of a state to be received and considered in proof of claims under the act. By implication he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832. It was incident to his duty and authority in settling claims under that act. When the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department in support of any claim against the United States, and the party swears falsely, the case is within the provision of the act of 1823, ch. 165.

If a state magistrate shall administer an oath under an act of congress expressly giving him the power to do so, it would be a lawful oath, by one having competent authority; and as much so as if he had been specially appointed a commissioner under a law of the United States for that purpose: and such an oath, administered under such circumstances, would be within the purview of the act of 1823.

The act of 1823 does not create or punish the crime of perjury, technically considered. But it creates a new and substantial offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate under the state laws had jurisdiction, so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate, and was not in violation of his official duty.

The language of the act of 1823 should be construed with reference to the usages of the treasury department. The false swearing and false affirmation referred to in the act, ought to be construed to include all cases of swearing and and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to

include all such cases; and there is no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied.

The act does no more than change a common law offence into a statute offence.

ON a certificate of division in opinion between the judges of the circuit court of the United States for the district of Kentucky

At the November term 1834, of the circuit court of the United States for the Kentucky district, an indictment was found against John Bailey for perjury and false swearing, under the third section of the act of congress of March 1, 1823, 3 Story's Laws U. S. 1917, the thirteenth section of the act of March 3, 1825, 3 Story's Laws U. S. 2002.

The third section of the act of March 1, 1823, "entitled an act in addition to the act entitled an act for the prompt settlement of public accounts, and for the punishment of the crime of perjury," is in these words "that if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury The thirteenth section of the act of March 3, 1825, entitled an act more effectually to provide for the punishment of certain crimes against the United States, and for other purposes, declares: "that if any person in any case, matter, hearing, or other proceeding, where an oath or affirmation shall be required to be taken or administered, under or by any law of the United States, shall, upon the taking of such oath or affirmation, knowingly and willingly, swear or affirm falsely, every person so offending shall be deemed guilty of perjury, and shall, on conviction thereof, be punished," &c.

The indictment charged the defendant, John Bailey, with perjury and false swearing, upon the following affidavit, made by him before a justice of the peace of the commonwealth of Kentucky.

"The commonwealth of Kentucky, county of Bath, to wit

"The affidavit of John Bailey, one of the executors of captain John Bailey, deceased, states that he is not interested in said estate, that Warren Bailey, Jun., and James C. Bailey, who have joined with him in a power of attorney, to the honourable Richard M. Johnson, to draw any moneys that may be

due them, from the government of the United States, are the residuary legatees, and solely interested, that he is years of age, and the son of said John Bailey, deceased, who from his earliest recollection, was reputed a captain in the revolutionary army, and in the Illinois regiment, that he has seen his father's commission, and thinks there were two, of that fact he will not be certain, but it is his strongest impression, and is perfectly confident that the commissions, if two, both were signed by Thomas Jefferson, that his father's papers fell into his hands, as executor, and he has made many fruitless searches for them, and can in nowise account for their loss, unless they were given to general Thomas Fletcher, deceased, while a member of congress, to see if he could get any thing, as affiant knows that his father applied to said Fletcher to do something for him, and understood afterwards, the law had made no provision for cases situated like said John Bailey's. As witness my hand and seal, this of November 1832.

"JOHN BAILEY, [SEAL]."

The record of the circuit court contained the following statement of the facts and proceedings of the case, and of the division of opinion by the judges of the court.

"The attorney for the United States read, in evidence, the papers set out in the indictment purporting to be the affidavit of the prisoner, with the certificates of the said Josiah Reed and William Suddeth, and gave evidence to the jury conducing to prove that the prisoner did, at the time and place charged in the indictment, take the oath as charged, and subscribe the paper set out in the indictment as his affidavit before the said Reed, and that the said Reed was then and there a justice of the peace of the commonwealth of Kentucky, in and for the said county of Bath, duly commissioned, qualified, and acting as such, and also gave evidence conducing to prove that, immediately after the passage of the said act of congress of the 5th day of July 1832, entitled 'an act for liquidating and paying certain claims of the state of Virginia,' the secretary of the treasury did establish, as a regulation for the government of the department and its officers, in their action upon the claims in the said act mentioned, that affidavits made and subscribed before any justice of the peace, of any of the states of the United

States, would be received and considered, to prove the persons making claims under said act, or the deceased whom they represented, were the persons entitled under the provisions thereof, and that the said regulations had been ever since acted under at the department, and numerous claims heard, allowed and paid on such affidavits, and also gave evidence conducing to prove that the prisoner, acting as the executor of his father, John Bailey, had, before the time of making and subscribing said affidavit, asserted the claim therein mentioned, and employed Thomas Triplett to prosecute the same, and receive the money thereon, that the said Triplett did afterwards present the said affidavit and certificates, in support of said claim at the said department, on which, together with other affidavits, the same was allowed and the money paid, and a part thereof paid to the prisoner. The above being all the evidence conducing to prove the authority or jurisdiction of the said Josiah Reed, to administer said oath and take said affidavit, the counsel for the prisoner moved the court to instruct the jury, that the said Josiah Reed had no authority or jurisdiction to administer said oath or take said affidavit, and that whatever other facts they might find on the evidence, the prisoner could not have committed the crime of perjury, denounced by the thirteenth section of the act of congress, more effectually to provide for the punishment of certain claims against the United States and for other purposes, 'approved on the 3d of March 1825,' nor of false swearing denounced by the third section of the act 'in addition to the act' entitled 'an act for the prompt settlement of public accounts and for the punishment of the crime of perjury,' approved on the 1st of March 1823, and their verdict ought to be for the prisoner, which motion the attorney for the United States opposed.

"On this question, the judges were divided and opposed in opinion, whereupon, on the motion of the attorney of the United States, the said question and disagreement are stated, and ordered to be certified to the supreme court."

The case was argued by the Attorney-General, and Mr Loughborough, for the United States. No counsel appeared for the defendant.

For the United States the following points were made.

1. That the act of the 5th of July 1832, is in pari materia with the other acts of congress upon the subject of claims for revolutionary services, and that evidence under it may legally be taken, as in cases of claims under those other laws. 3 Story 1663, 1739, 1778, 1927.

2. That the secretary of the treasury pursued the intent of the act of 1832, in requiring the affidavit in this case, and that the oath falls within the thirteenth section of the crimes act of 1825.

3. That the act of 1823 embraces all oaths, that, by the usage of the government, are received as evidence in support of claims against the United States.

4. That the justice of the peace had jurisdiction to administer this oath under the said act.

5. That the act embraces every case of swearing in which a false oath is actually taken, and the affidavit is used fraudulently in support of a claim against the United States.

6. That this construction of the act creates no new offence, the evidence against the prisoner showing an offence which would be punishable if the circuit court had a common law jurisdiction of crimes. 1 Hawk. 430, Noy 100, Moore 627, Hob. 62, 8 East's Rep. 364.

7. That in a prosecution upon the act of 1823, it is not necessary to a conviction to show the requisites of technical perjury.

Mr Loughborough, for the United States.

The indictment is founded upon the thirteenth section of the crimes act of 1825, 3 Story 2002, and the third section of an act of 1823. 3 Story 1917. Two counts of the indictment charge the offence of perjury under the first named law, and two, the offence of false swearing denounced by the act of 1823.

The oath was made before a justice of the peace of the commonwealth of Kentucky, in support of a claim by the prisoner against the United States, as the executor of his father, John Bailey, falsely alleged to have been a captain in the Illinois regiment in the army of the revolution, for the amount of half pay due to such captain, in virtue of the provisions of an act of congress of July 5th 1832, entitled "an act to provide for

liquidating and paying certain claims of the state of Virginia."

The objections to the prosecution, in the court below, took a wide range. It was urged on behalf of the prisoner, that the oath upon which perjury or false swearing is assigned, must be a legal oath, that is, an oath taken before an officer having a jurisdiction to administer it—that congress could not confer upon the justice jurisdiction to administer this oath—that such jurisdiction had not in fact been confirmed by congress—that the practice of the government, and the regulations of the treasury, could not give the jurisdiction—that the United States could not punish the swearing falsely, in an oath taken before a state officer.

The point certified for the opinion of this court regards the jurisdiction of the justice the difficulty in the mind of one of the judges below, existing on the ground that the oath in the case had not been authorised by act of congress, to be taken before the justice.

As to so much of the objections to the prosecution as rests upon assumed constitutional grounds, little need be said. It is not supposed they would be seriously urged in this tribunal. A glance at the statute books of the United States will show what has been the sense of congress upon the subject.

The first act of congress, after the adoption of the present constitution, authorised oaths to be administered by state officers.

Oaths of custom-house officers may be taken before state justices. Story 17.

Depositions in courts of the United States may be made before state judges, 1 Story 64, and perjury in them is punishable by the United States.

By an act of March 3d 1819, oaths therein directed may be made before state officers, and false swearing is expressly made perjury 3 Story 1736.

False swearing before state officers, in support of claims for pensions, under the acts of 1818 and 1820, is expressly made punishable as perjury

Instances might be multiplied to show that congress frequently avails itself of the agency of state officers in executing

its laws, and supposes its power competent to the punishment of offences committed by, or before them.

To deny these powers in the federal government, would be to create a necessity for a great multiplication of federal officers to discharge duties now well performed by state functionaries. That congress might avail itself of the agency of state officers, was admitted at the period of its adoption. See Federalist 82, and as late as the case of Houston v. Moore, 3 Wheaton 433, 4 Cond. Rep. 286. It is not a question whether congress can compel a state officer to perform a duty, or make an obligatory enlargement of his jurisdiction. Here the justice has exercised the jurisdiction.

Acts upon the same subject, should receive the like construction. This is one of the soundest rules. The act of July 5, 1832, under which this oath was taken, is in pari materia with the other acts for the payment of claims for revolutionary services, as pensions and half-pay. These acts constitute a system of legislation. How may other claims for pensions and half-pay be obtained?

Previous to 1818, evidence for pensions was to be made before federal officers. See acts of 1793, 1803 and 1806, Story 304, 903, 1008.

But by the act of 1816, Story 1562, the President and secretary of war were authorized to prescribe forms of evidence in cases under that act, for five years half-pay pensions.

By the act of 1818, Story 1663, and the following other acts, oaths for pensions may be made before state officers· act of 1819, Story 1739, act of 1820, Story 1778, act of 1823, Story 1926.

The act of May 15th 1828, directs pensions to be granted to those who shall produce to the secretary of the treasury, "satisfactory evidence" that they are entitled. This act places upon the pension roll, a distinct class of persons not before entitled.

The act of June 7th 1832, is supplementary to that of 1828. It places also upon the roll, a new class of persons, who shall produce "satisfactory evidence" that they are entitled.

Under these last two acts, a very large number of pensions have been granted, and five-sixths of them upon oaths made before state officers. Are these oaths illegal and unauthorized? Have the pensions been improperly granted? Shall they now

be arrested? Neither of the acts authorises state officers to administer the oaths which were received as evidences by the department. These acts merely required that the evidence should be "satisfactory" to the secretary. By receiving under them evidences made in the manner expressly authorised by congress in similar cases, under laws relating to the same general subject, did the department pass beyond the line of its duty?

The certificate shows, that the affidavit in this case was made pursuant to a regulation of the secretary of the treasury, to carry into effect the act of July 5th 1832. That act devolved upon him the performance of a certain duty. To perform this duty, it was essential he should inform himself in every case arising under the act, of certain facts. Who are the identical officers entitled to half-pay—whether living or dead, and if dead who their representatives are. these are things of which it is manifest the secretary of the treasury could, as such, have no intuitive knowledge. The act of congress gave him no knowledge upon these points. It is general. To the officers or their representatives he shall pay the money. The act does not prescribe the mode in which he shall be informed. It was essential then that it should be prescribed by himself. As *he* is to be satisfied of certain facts, it is for *him* to say to claimants how they shall proceed to effect that object. He has prescribed the mode of procedure, and in doing so, must be supposed to have exercised a power vested in him by necessary implication. Was it illegal or improper for him to make a regulation, when without a regulation the law must have remained a dead letter?

Then, as to the nature of the regulation made by the secretary. It is to receive as evidence an oath before a state justice of the peace—a mode of evidence expressly prescribed by congress in similar cases of claims against the United States, under laws in pari materia with that which he was executing. Not only, then, has the secretary adopted no novel or improper mode of proof, but he has only availed himself of an instrument, placed under his control in like cases, and which, when the uniform practice of the government is considered, congress must have supposed at his disposition in a case in which no other direction is made by it.

It has been the uniform practice, it is believed, of the government, to receive in support of claims against the United States, evidence such as the present. In the various accounting offices of the treasury, depositions and affidavits before state officers are, and have been taken as competent proofs in support of claims and accounts. Congress, and its various committees, have also been in the constant practice of receiving these affidavits as competent evidence in support of claims. In the judiciary department of the government, also, it has been, and is yet the practice to receive as affidavits papers sworn to before state magistracy. It will be strange, if it shall now for the first time be discovered, that these oaths are not such legal oaths as that they who falsely take them may be punished—strange, that congress and every other department of the government, should have remained in darkness till the present day—and that a practice, coeval with the government, shall have now to be set aside as erroneous. If such be the case, then it will result that things may be oaths for some purposes and not for others, that a paper may be an affidavit for the purpose of effecting a fraud, and yet not one for the purpose of judicial examination.

The thirteenth section of the crimes act of 1825 makes it perjury to swear falsely in any case, matter, hearing or other proceedings, whenever an oath shall be required to be taken, under any act of congress. Such was the oath in the present case. This was a proceeding by claim on the part of the prisoner against the United States, and the oath was required to be taken by the secretary of the treasury under the act of July 5th 1832. It has been attempted to be shown that the secretary of the treasury holds the power to require this oath. If this be so, it results that the justice had jurisdiction to administer it. He had such a jurisdiction as the secretary of the treasury deemed competent. And as he has exercised it, and the paper has been used as an affidavit or sworn paper by the party, the objection of the want of jurisdiction will not lie.

It is not necessary at common law, in a prosecution for perjury, to show that the oath was expressly directed by an act of parliament. Perjury may be committed in false swearing in a court of equity, ecclesiastical, military or maritime. 1 Hawk. Pl. 430. So also false oaths taken before commission-

ers appointed by the king to examine witnesses in relation to any matters concerning his honour or interest, are perjuries, 1 Hawk. Pl. 430, or before commissioners to inquire of the forfeiture of his tenants' estates. Noy 100, Moore 627, Hob. 62. In Connecticut it has been settled that wherever the administration of an oath is lawful, that is, not forbidden, false swearing is perjury at common law 2 Conn. Rep. 30. Here, the justice is as the commissioners appointed by the crown to examine a witness concerning its interest. At common law, and in England, then, the offence in this case would be a perjury: and the construction of the act of 1825, which makes it embrace this case, creates no new offence, nor an offence which the court below would not have power to punish, if it possessed a common law jurisdiction of crimes.

If, however, the case does not fall within the act of 1825, it is respectfully contended that it is embraced by the act of 1823 for the punishment of the offence of false swearing in support of claims against the United States.

Previous to a discussion of this statute, we will examine the doctrines of the common law as to false oaths. That law does not content itself with the punishment of the crime of perjury only As all false swearing is not, technical, perjury, the common law would be very defective if it visited with punishment the one species only of this class of offences. Accordingly, it will be found that the law is not thus deficient. It is held that false swearing in fraud of another's right, or to the stoppage or hindrance of justice, is a misdemeanour, punishable by fine, imprisonment and corporal pain.

Where an act of parliament requires an oath to be taken, false swearing is not perjury unless the statute so declares. 4 Christian's Black. 137, note. Will it be said, however, that such false swearing is no offence? That it is no misdemeanour, because it is no felony?

In the case of O'Mealy v. Newell, 8 East 364, a false affidavit made in France, was produced and used in the king's bench. Lord Ellenborough held it an offence punishable at common law as a misdemeanour. In that case, a prosecution in England for perjury could not be sustained, because the swearing was out of the kingdom. The court could not take cognizance of any fraud committed out of its jurisdiction. In

this case, supposing the court below to have possessed a common law jurisdiction of crimes, can it be doubted that the certificate shows a misdemeanour on the part of the prisoner, a false oath actually made within the jurisdiction of the court, and used as a competent and true affidavit in the successful perpetration of a fraud? The general principle of the common law, and the case in East, irresistibly lead to this conclusion.

In prosecuting Bailey, therefore, for false swearing, in support of a claim against the government, nothing was done which the common law would not sanction. But as it is not contended that the circuit court derives from the common law any power to punish offences, it remains to show that the indictment and the case shown in the certificate, fall within the statute upon which the prosecution was based. In doing this, it will appear that the act of 1823 creates no new offence. It only prescribes a punishment for, and gives the courts of the union jurisdiction to try an offence before known to the common law. It simply converts a common law misdemeanour, into the special statutory offence of "false swearing." As a statutory offence only, it is a new one. In a prosecution founded upon the act of 1823, it is not necessary to show the requisites of technical perjury. It is necessary merely that the case be brought within the words of the statute. This is all that is ever required upon indictments concluding against the form of a statute.

The words of the act are, that "if any person shall swear falsely in support of a claim against the United States, he shall suffer," &c. It does not say how, or before whom, the false oath punished by it shall be taken. Why was the act made thus general? The answer is, that the lawmakers were aware of the practice of the government, in every department, to receive oaths before state officers in support of claims. The inconvenience of abolishing this practice, and requiring claimants to go in all cases before federal judges was obvious. Congress, therefore, left the practice undisturbed, as it had always existed, but affixed to falsehood in these oaths the punishment of perjury Indeed, considering the uniform practice of the departments and of congress itself, to receive these oaths as evidence, and the presumption that it must have been

in the minds of the legislators, at the time of the adoption of the act of 1823, the conclusion cannot well be resisted, that the generality of the language of that act was of purpose to embrace oaths such as this.

Thus regarding the subject, it is contended, that the justice had a jurisdiction to administer this oath under the act of 1823. But it is submitted whether upon a true construction of that act, and the application of it to the facts of this case, a difficulty as to the want of jurisdiction in the justice, can be resisted by one who has actually taken a false oath, and successfully used it, in support of a fraudulent claim against the United States. Without any particular inquiry as to jurisdiction, does not the act of 1823 extend to every case in which a false oath is actually taken in support of a claim? Does it not embrace every case in which the oath is, by the admitted practice of the departments, received as evidence in support of claims? It is contended that it does.

Justices of the peace have, by common law, a power to administer oaths in some cases. Burn's Justice, "Oaths."

In Kentucky, justices have a criminal and a civil jurisdiction, in matters of tort and contract, and their proceedings are, by law, records. 2 Dig. Kent. Laws 701. The justice of the peace was, by the laws of Kentucky, as competent to take this affidavit as the highest judge of the state, or as any other court of record.

The Kentucky statute against perjury, 2 Dig. Kent. Laws 994, punishes false swearing, in certain cases, before justices of the peace.

By the nature of his office, therefore, the justice had a general jurisdiction to administer oaths. It was in contemplation of such a jurisdiction, that the secretary of the treasury made the regulation found in this case, and that the prisoner took the oath.

Suppose this oath had been made before the United States district judge; would not the objection of the want of jurisdiction then lie as well as now? No law of congress has expressly authorized him to administer the oath? And he has no more general right to administer oaths than the Kentucky justice of the peace.

It is unnecessary to dwell upon the consequences to flow

from a decision of this case against the prosecution. They are obvious. They may be summed up as constituting much public inconvenience and mischief, and great private wrong, not to speak of the impunity with which frauds, in cases of revolutionary claims, will have been perpetrated. Truly, there is nothing in these results to attract the court.

Mr Butler, attorney-genoral, declined going at large into an argument of the case, after it had been so fully discussed by Mr Loughborough, but would give the court some references to provisions of the laws of the United States.

The third and fourth counts in the indictment are on the act of 1823, and charge the defendant with "false swearing." The first count charges perjury, and is not founded on that act. If the act of 1823 created a new offence, one not before known, that of false swearing to support claims on the United States, the three counts in the indictment can be supported. The case admits the false swearing, and this brings the defendant within the provisions of that law The affidavit made by the defendant before a magistrate was false, why is he not within the law? The doubt is whether the magistrate had authority to administer such an oath. This is the point the court must decide.

The act of 1823 does not prescribe what magistrates shall administer the oath, or affirmation. If there is any doubt of the false swearing being a crime under the statute, it must rest on the assertion, that congress meant to make it an offence, only, where the affidavit was taken before a judicial officer of the United States, or an officer of a state specially authorized to administer the oath.

The counsel who has argued the case, has shown acts of congress in pari materia. The act of 1823, he rightly says, was passed by the legislature adverting to former acts, and to the practice under them.

It has always been the practice of congress, to give power to state magistrates to administer oaths in cases of this kind, or in cases calling for affidavits. The first act passed by congress, 1 Story's Laws 1, was such a case.

The inducement to authorise this practice, in addition to the convenience it afforded, was the indisposition to create a

great number of officers of the United States, having authority to administer oaths, and answerable only to the United States. The allowance of this power to state officers, was within the principle which operated upon those who formed the government, and who desired that it should not be exposed to consolidation. Statutes in which such powers are given to state officers, will also be found in 1 Story 17, 69, 73, 180, 214, 224, 225, 226, 301, and in many other places in the statute books. To show that congress have recognized the power of the secretary of the treasury to make regulations in relation to claims on the United States, cited, 1 Story's Laws U. S., sect. 7. Many of the operations of the treasury are conducted under regulations established by the secretary of the treasury

In legislating on the claims which the law declared should be paid by the secretary of the treasury, congress adverted to the established custom of the department by which the secretary was to satisfy himself, that claimants were entitled to the benefit of this law

Mr Justice STORY delivered the opinion of the Court.

This is a criminal case, certified from the circuit court of the district of Kentucky upon a division of opinion of the judges of that court.

The defendant, John Bailey, was indicted for false swearing under the third section of the act of congress of the 1st day of March 1823, ch. 165, which provides "that if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury." The indictment charges the false swearing to be in an affidavit made by the defendant, before a justice of the peace of the commonwealth of Kentucky, in support of a claim against the United States, under the act of congress of the 5th day of July 1832, ch. 173, to provide for liquidating and paying certain claims of the state of Virginia and there are various counts in the indictment, stating the charge in different manners. It appears from the record, that at the trial "the attorney for the United States read in evidence the papers set out in the indictment, purporting to be the affidavit of the prisoner, with the certificates of the said Josiah Reed and Wil-

liam Suddeth, and gave evidence to the jury, conducing to prove that the prisoner did, at the time and place charged in the indictment, take oath as charged, and subscribe the paper set out in the indictment as his affidavit, before the said Reed, and that the said Reed was then and there a justice of the peace of the commonwealth of Kentucky, in and for the said county of Bath, duly commissioned, qualified and acting as such, and also gave evidence conducing to prove, that immediately after the passage of the said act of congress of the 5th day of July 1832, entitled "an act for liquidating and paying certain claims of the state of Virginia," the secretary of the treasury did establish, as a regulation for the government of the department and its officers, in their action upon the claims in said act mentioned, that affidavits made and subscribed before any justice of the peace, of any of the states of the United States, would be received and considered, to prove the persons making claims under said act, or the deceased whom they represented, were the persons entitled under the provisions thereof, and that the said regulations had been ever since acted under at the department, and numerous claims heard, allowed and paid on such affidavits, and also gave evidence conducing to prove that the prisoner, acting as the executor of his father, John Bailey, had, before the time of making and subscribing said affidavit, asserted the claim therein mentioned, and employed Thomas Triplett to prosecute the same, and receive the money thereon, that the said Triplett did afterwards present the said affidavit and certificates, in support of said claim at the said department, on which, together with other affidavits, the same was allowed and the money paid, and a part thereof paid to the prisoner. The above being all the evidence conducing to prove the authority or jurisdiction of said Josiah Reed, to administer said oath and take said affidavit, the counsel for the prisoner moved the court to instruct the jury, that the said Josiah Reed had no authority or jurisdiction to administer said oath or take said affidavit, and that whatever other facts they might find on the evidence, the prisoner could not have committed the crime of perjury, denounced by the thirteenth section of the act of congress, more effectually to provide for the punishment of certain claims against the United States and for other purposes, "approved on the 3d of March 1825," nor of false swearing de-

nounced by the third section of the act "in addition to the act" entitled "an act for the prompt settlement of public accounts, and for the punishment of the crime of perjury," approved on the 1st of March 1823, and their verdict ought to be for the prisoner, which motion the attorney for the United States opposed.

On this question, the judges were divided and opposed in opinion, whereupon, on the motion of the attorney of the United States, the said question and disagreement were stated, and ordered to be certified to the supreme court.

It is admitted that there is no statute of the United States which expressly authorizes any justice of the peace of a state, or indeed any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States under the act of 1832, ch. 173. And the question is, whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing, within the true intent and meaning of the act of 1823, ch. 165.

It is unnecessary to consider in this case, whether an oath taken before a mere private or official person, not authorized to administer an oath generally, or in special cases, or not specially authorized, recognised or allowed by the regulations or practice of the treasury department, as competent to administer an oath, in support of any claim against the United States, would, though the claim should be admitted or acted upon in the treasury department, under such a supposed sanction, be within the provision of the act of 1823, ch. 165. These questions may well be reserved for consideration until they shall arise directly in judgment. In the present case, the oath was administered by a state magistrate, having an admitted authority under the state laws to administer oaths, virtute officii, in many cases, if not in the present case, and it is further found in the case, that there was evidence at the trial conducing to prove, (and for the purposes of the present argument it must be taken as proved) that the secretary of the treasury did establish a regulation, authorizing affidavits made before any justice of the peace, of a state, to be received and considered in proof of claims under the act of 1832, so that the solution of the question, now before us, depends upon this, whether the oath, so

administered under the sanction of the treasury department, is within the true intent and meaning of the act of 1823.

Admitting, for the sake of argument, that it is true (on which, however, we express no opinion) that a state magistrate is not compellable to administer an oath, virtute officii, under a law of the United States which expressly confers power on him for that purpose, still, if he should choose to administer an oath under such a law, there can be no doubt, that it would be a lawful oath, by one having competent authority, and as much so, as if he had been specially appointed a commissioner under a law of the United States, for that purpose. And we think, that such an oath administered under such circumstances, would clearly be within the provision of the act of 1823. That act does not create or punish the crime of perjury, technically considered. But it creates a new and substantive offence of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state laws, had judicial jurisdiction, so as to make the false swearing perjury. It would be sufficient that it might be lawfully administered by the magistrate, and was not in violation of his official duty

There being no express authority given by any law of the United States, to any state magistrate, to administer an oath in the present case, the next inquiry naturally presented is, whether the secretary of the treasury had an implied power to require, authorize, allow or admit any affidavits sworn before state magistrates, in proof or in support of any claim under the act of 1832, for if he had, it would be very difficult to show that such an affidavit is not within the true intent and meaning of the act of 1823, as it certainly is within the very words of the enactment. The policy of the act clearly extends to such a case, and the public mischief to be remedied is precisely the same, as if the affidavit had been taken under the express and direct authority of a statute of the United States.

And we are of opinion, that the secretary of the treasury did, by implication, possess the power to make such a regulation, and to allow such affidavits in proof of claims, under the act of 1832. It was incident to his duty and authority, in settling claims, under that act. The third section provides "that the

secretary of the treasury be, and he is hereby directed and required to adjust and settle those claims for half pay of the officers of the aforesaid regiment and corps, which have not been paid, &c., which several sums of money herein directed to be settled or paid, shall be paid out of any money in the treasury not otherwise appropriated by law." It is a general principle of law, in the construction of all powers of this sort, that where the end is required, the appropriate means are given. It is the duty of the secretary to adjust and settle these claims, and in order to do so he must have authority to require suitable vouchers and evidence of the facts, which are to establish the claim. No one can well doubt the propriety of requiring the facts which are to support a claim, and rest on testimony, to be established under the sanction of an oath, and especially in cases of the nature of those which are referred to in the act, where the facts are so remote in point of time, and must be so various in point of force and bearing. It cannot be presumed that congress were insensible of these considerations, or intended to deprive the secretary of the treasury of the fullest use of the best means to accomplish the end, viz. to suppress frauds, and to ascertain, and allow just claims. It is certain, that the laws of the United States have, in various cases of a similar nature, from the earliest existence of the government down to the present time, required the proof of claims against the government to be by affidavit. In some of these laws authority has been given to judicial officers of the United States to administer the oaths for this purpose, and at least as early as 1818, a similar authority was confided to state magistrates. The citations from the laws, made at the argument, are direct to this point, and establish in the clearest manner a habit of legislation to this effect.(a) It may be added, that it has been stated by the attorney-general, and is of public notoriety, that there has been a constant practice and usage in the treasury department in claims against the United States, and especially of a nature like the present, to require evidence by affidavits in support of the claim, whether the same has been expressly

(a) Act of 28th of February 1793, ch. 61,'[17]. Act of 3d March 1803, ch. 90. Act of 10th of April 1806, ch. 25. Act of 18th of March 1818, ch. 18. Act of 1st of May 1820, ch. 51. Act of 3d of March 1823, ch. 187.

required by statute or not, and that, occasionally, general regulations have been adopted in the treasury department for this purpose.

Congress must be presumed to have legislated under this known state of the laws and usage of the treasury department. The very circumstance that the treasury department had, for a long period, required solemn verifications of claims against the United States, under oath, as an appropriate means to secure the government against frauds, without objection, is decisive to show that it was not deemed an usurpation of authority.

The language of the act of 1823 should, then, be construed with reference to this usage. The false swearing and false affirmation, referred to in the act, ought to be construed to include all cases of swearing and affirmation required by the practice of the department in regard to the expenditure of public money, or in support of any claims against the United States. The language of the act is sufficiently broad to include all such cases, and we can perceive no reason for excepting them from the words, as they are within the policy of the act, and the mischief to be remedied. The act does no more than change a common law offence into a statute offence.

There is nothing new in this doctrine. It is clear, by the common law, that the taking of a false oath, with a view to cheat the government, or to defeat the administration of public justice, though not taken within the realm, or wholly dependent upon usage and practice, is punishable as a misdemeanour. The case of O'Mealy v. Newell, 8 East's Rep. 364, affords an illustration of this doctrine. In that case it was held, that a person making, or knowingly using a false affidavit of debt, sworn before a foreign magistrate, in a foreign country, for the purpose of holding a party to bail in England, although such affidavit was not authorized by any statute, but was solely dependent upon the practice and usage of the courts of England, was punishable as a misdemeanour at the common law, as an attempt to pervert public justice. Upon this occasion Lord Ellenborough, after alluding to the practice of receiving such affidavits made in Ireland and Scotland, as well as in foreign countries, said, the practice in both cases must be equally warranted or unwarranted. In none of these cases

can the party making a false affidavit be indicted specifically for the crime of perjury, in the courts of this country But in all of them, as far as he is punishable at all, he is punishable for a misdemeanour, in procuring the court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose. And the court held the practice perfectly justifiable.

Upon the whole, we are of opinion that where the oath is taken before a state or national magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the treasury department, or in conformity with the practice and usage of the treasury department, so that the affidavit would be admissible evidence at the department in support of any claim against the United States, and the party swears falsely, the case is within the purview of the act of 1823, ch. 165. It will be accordingly certified to the circuit court, that the said Josiah Reed, named in the certificate of division of the judges of the circuit court, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath, and take the affidavit in the said certificate of division mentioned, and that if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st day of March 1823, referred to in the same certificate.

Mr Justice M'LEAN dissenting.

The question involved in this case is important, as it regards the construction of a highly penal law of the union, and of still greater importance, as it respects the powers of state officers under an act of congress which confers on them no special authority.

In the third section of the act of congress of the 1st of March 1823, it is provided, that "if any person shall swear or affirm falsely, touching the expenditure of public money, or in support of any claim *of* the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury" And in the thirteenth section of the act of the 3d of March 1825, it is declared, that "if any person, in any case, matter, hearing or

other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon taking such oath or affirmation, knowingly and willingly swear or affirm falsely, every person so offending shall be deemed guilty of perjury, &c."

These are the acts under which the offence of false swearing is charged against the defendant. The oath was administered by Josiah Reed, a justice of the peace for Bath county, in the state of Kentucky, with the view of obtaining money from the government. It does not appear that in this law or any other the claim asserted was required to be substantiated by oath, but it was proved that such requirement was made by the secretary of the treasury, whose duty it was to decide on the merits of the claim. Nor does it appear that any authority has been given by any act of congress to a justice of the peace to administer an oath in such a case, and the question arises, whether, admitting the affidavit of Bailey to be false, justice Reed had power to administer such an oath? If it shall be found that no such power existed, the false swearing, though highly immoral, is not an offence under either of the acts of congeess which have been cited.

The statutes of 1823 and 1825 above cited, have extended the crime of perjury, or the punishment annexed to it, to a false swearing, which neither by the common law nor the previous acts of congress, constituted perjury Beyond this these acts do not go. They do not dispense with any of the essential requisites, beyond what is expressed, to constitute the crime of perjury.

The definition of perjury at common law, as given by Hawkins, is, "a wilful, false oath, &c. in any procedure in a course of justice." This offence may be commited in depositions, affidavits, &c. taken out of a court of justice.

By the act of congress of 1790, it is provided, that "if any person shall wilfully and corruptly commit perjury on his or her oath or affirmation, in any suit, controversy, matter or cause depending in any of the courts of the United States, or in any deposition taken pursuant to the laws of the United States, every person so offending shall suffer, &c. In 4 Black. Com. 136, it is stated, "the law takes no notice of any perjury but such as is committed in some court of justice having power

to administer an oath, or before some magistrate or proper officer invested with a similar authority" And lord Coke, in 3 Inst. 165, says, "that no old oath can be altered or new oath raised, without an act of parliament, or any oath administered by any that hath not allowance by the common law, or by act of parliament."

No one can doubt, that an oath administered by a person without authority is a void act. It imposes no legal obligation on the person swearing to state the truth, nor is he punishable under any law for swearing falsely in such a case.

The prosecution in this case is attempted to be sustained on two grounds.

1. From the general language of the law defining the offence of false swearing.

2. From the usage of the treasury department.

And first, as to the language of the act under which this prosecution was commenced. The act is general in its language against "any person who shall swear falsely;" but it gives no authority, either general or special, to administer an oath. This power must be sought in other acts of congress, or in a judicial office to which the power is incident.

The federal government is one of limited and specific powers. In the discharge of its functions, except in certain specified cases, its acts are as distinct from those of a state government, as if they were foreign to each other. The officers of the one government, as such, can do no official acts under the other the sources of their authority are different, as well as their duties and responsibilities.

When a law for the punishment of offences is passed by either the federal or a state government, it can only operate within the proper jurisdiction. The officers of the federal government can take no cognizance of the penal laws of a state, nor can the judiciary of a state, in my opinion, carry into effect the criminal laws of the union. If this could be done, it would consolidate the jurisdictions of the respective governments, and introduce into our judicial proceedings the utmost confusion. It is not in the power of congress to transfer any part of the jurisdiction which the constitution has vested in the federal government. If this can be done by congress, to any extent, it may be done without limitation, and in this way the powers

of the federal government might be lessened or utterly destroyed.

A federal judicial officer, either by act of congress or as an incident to his office, has the power to administer oaths. This power, however, can only be exercised within the jurisdiction of the federal government, and in cases where an oath is required or sanctioned by the laws of that government. And so of the judicial officers of a state. If either officer act beyond the sphere of his appropriate jurisdiction, his act is a nullity

In this view of the case, there is no difference in principle between administering an oath, and any other act which belongs to the judicial character of the officer.

By an act of congress, depositions may be taken before certain state officers, in any cause pending in the courts of the United States. Among these officers a justice of the peace is not named, unless he be a judge of a county court and it has been often decided, that a deposition taken before a justice of the peace, who is not a member of a county court, or before any other state officer than those named in the act, cannot be read in evidence.

Under the state jurisdiction, the justice may have power to administer oaths, but he is not recognized as having a right to exercise this power under the act of congress. And would any one contend that a deposition taken before a justice, under such circumstances, could lay the foundation of a prosecution for perjury?

The state officers named in the act, as having the power to take depositions, do not act, in taking them, under their general power to administer oaths as state officers, but under the special authority of the act of congress. Any other persons designated by their official characters, might as well have been named in the act of congress, though they had no power under any law of the state, to administer oaths. The officers named in the act, are referred to as descriptive of persons who may exercise the authority given, and for no other purpose.

In the argument of this case, for the prosecution, a great number of acts of congress were read, granting pensions and for other purposes, in which state officers were specially authorized to administer oaths. This I take to be a conclusive ex-

position by congress, against the powers of state officers to administer oaths for federal purposes. Would a special authority have been vested in them for this purpose, if, in the opinion of congress, they possessed a general authority under the state laws? But one answer can be made to this inquiry Congress knew well that state officers could exercise under their general authority, no such power, and it was expressly conferred on them by an act of federal legislation.

If this power to administer an oath by a judicial officer of a state, in matters of a civil nature which relate to the federal jurisdiction, cannot be recognized as legal, much less should it be sanctioned, as laying the foundation of a prosecution for perjury The false swearing with which the defendant stands charged, though not technically perjury, is punished as such.

Under a general law of a state which defines the offence and provides for the punishment of perjury, would a false oath taken before a federal judicial officer be punishable? Would it not be essential, in such a case, to show that the person administering the oath, acted under the authority of the state? Could the state tribunals recognize any other authority than that which belongs to their own jurisdiction? If no state law authorises an oath to be administered by a federal officer, can he administer it, for state purposes? Could the acknowledgement of a deed or other instrument be made before a federal judge, under a general statute of a state requiring such instrument to be acknowledged before a' judge of the court? All these questions must be answered in the negative.

To say that the federal officer has a right to administer oaths by an act of congress, or as an incident of his office, does not remove the objection. Can a judge of the federal court exercise his functions in a state tribunal? Such a pretension would be too absurd to merit serious consideration. And, yet, is there any difference in principle between a federal judicial officer discharging his function in a state tribunal, and administering an oath for state purposes. Does he not, in both cases, exercise the functions of his office under the jurisdiction of the state.

It is admitted that the legislature of a state, as well as congress, may authorise any persons, by name, or by their official designations, to administer oaths in all cases required, under

the laws of their respective governments but I am examining the case of the defendant where no statutory power to administer the oath, is pretended to have been given by congress.

Any official act of a federal officer, under the jurisdiction of a state, which has not authorised such act by him, is extra judicial, and in no point of view legal. Nor can an oath administered under such circumstances, however false, be punishable under a general statute of the state against false swearing. The act of administering the oath, being done without authority, is void. It subjects the false swearer to no greater penalty than if it had been administered by a private citizen, without any pretence of power.

The law, it may be said, denounces the punishment for false swearing generally And can there be a false swearing, within the meaning of the act, before a person who has no authority to administer an oath?

From these considerations it would seem that no punishment could be inflicted by a state tribunal, under an act against false swearing, where the oath had been administered by a federal officer, whose act was not sanctioned by any law of the state.

And if this be the case under the jurisdiction of a state, is it not equally clear that the same principle applies to the federal jurisdiction? If a state tribunal cannot punish for false swearing, where the oath is administered by a federal officer without any sanction by the laws of the state, can a federal tribunal punish for false swearing, where the oath is administered by a state officer without any sanction by the laws of the union.

The act of congress against false swearing is general, and no reference is made to the authority under which the oath shall be administered but does it not follow as a consequence, that the oath must be administered under the same jurisdiction which enacted the law? Did congress intend to punish an offence committed before a state tribunal? They had the power to punish false swearing, before any individual whom they might have authorised to administer the oath, but in this law they have not so provided, nor in any other law which relates to the case under consideration. It therefore follows, in this view, that justice Reed, in administering the oath to the

defendant, acted without authority, and the affiant cannot be subjected to the penalty for false swearing.

If this offence may be perpetrated before a state officer, because the law denouncing it is general, on the same ground, may not a state tribunal inflict the penalties of this law?

But it is insisted that under the rule of the treasury department which required the oath to substantiate the claim, the justice was authorised to administer the oath.

Can this position be sustained?

It has been shown that justice Reed, in administering the oath, did not act under the authority of the state, or of any law of congress, and the question is fairly presented, whether the secretary of the treasury has the power to invest any individual with a competent authority to administer oaths, in matters which relate to the treasury department.

That the secretary of the treasury, who, in the discharge of his duties, is required to investigate and decide annually, numerous and various claims on the treasury, may require certain claims to be substantiated by oath, is not controverted.

But this admission goes no length in sustaining the prosecution. for it does not follow, if the secretary require an oath in proof of a claim, that he can invest any individual with the power to administer such oath.

In the first place, there is no necessity for the exercise of the power, by the secretary; because there are officers of the United States who are duly authorised to administer oaths. But there is no power in any executive officer to clothe any individual with the important authority of administering oaths. It is a power which belongs to the legislative department, and can no where else be exercised.

In certain cases courts may issue commissions to take depositions, and these give authority to administer oaths in the cases stated; but this is done under the express sanction of law. Can the secretary himself administer an oath which shall lay the foundation of a prosecution for perjury? But it is said that it has been the usage of the department to act on oaths administered by state officers. That such has been the usage I can entertain no doubt, but there is no proof before this court, nor was there any before the circuit court, that such usage exists

in cases where congress have given no authority to administer the oath.

But suppose the usage did extend to cases where no authority had been given by congress to a state officer to administer an oath, could usage constitute the law in such a case. The usage of the department may not only fix the rule of decision, but, in many cases, the ground and extent of a claim against the government. But this usage cannot extend beyond the action of the department.

The secretary of the treasury requires oaths to be administered by state officers, in proof of certain claims, to guard the public interest, but does that legalize such a procedure? It may prove salutary for the purpose intended, but does it follow that the oaths administered by any one, if false, are within the act of congress against false swearing? This act is a highly penal one. A conviction under it destroys the character of the individual, and deprives him of his liberty. Like all other criminal acts, it should receive a strict construction, and no person should be subjected to its penalties who has not clearly violated its letter and spirit.

In one sense it may be said, that the defendant, Bailey, is within the law, because the law punishes false swearing, and he has sworn falsely before a justice of the peace. But the question recurs, had this justice the power to administer the oath? If he had not, Bailey has not incurred the penalties of the law

A decision from 8 East 364, has been read, as applicable to the case now under consideration. That was a case in which the court of king's bench decided that an affidavit taken in a foreign country, was sufficient, *under the practice of the court*, to hold a defendant to bail. But lord Ellenborough says, that "in none of these cases can the party making a false affidavit be indicted, specifically, for the crime of perjury in the courts of this country, but in all of them, as far as the party is punishable at all, he is punishable for a misdemeanour, *in procuring the court* to make an order to hold to bail, by means, and upon the credit of a false and fraudulent voucher of a fact, produced and published by him for that purpose."

It appears, from this opinion, that the false swearing in a foreign affidavit could not lay the foundation of a criminal

prosecution, but the *use* which was made of such affidavit, and the effect produced by it—these constitute the gist of the prosecution.

A false affidavit, to hold to bail, if made in England, and before a person competent to administer an oath, would be perjury. But lord Ellenborough says, in substance, if the oath be administered in a foreign country, or in Ireland or Scotland, though false, does not subject the affiant to a prosecution for perjury, nor for any criminal prosecution founded exclusively upon the false swearing.

If, by the practice of the court, a mere statement by the plaintiff were sufficient to hold to bail, and such statement were made falsely, it would subject the plaintiff to punishment by the common law, for, in the language of the judge, "*procuring the court to make an order to hold to bail, by means and upon the credit of a false and fraudulent voucher of a fact produced and published by him for that purpose.*"

This opinion, it appears to me, does not conflict with the view I have taken of this case.

But it is insisted, that the law against false swearing was passed with a knowledge by congress of the usage of the department to require oaths before state officers, and that it must be presumed, they intended to sanction such usage. Is such a presumption admissible in a criminal case? The effect of the law must be limited, in its penalties, to the jurisdiction under which it was enacted, and it should not be construed to embrace cases which do not come legitimately within its purview

A court, in giving a construction to a highly penal law, will look at its letter and spirit, and cannot extend its provisions by construction, from motives of policy which may be supposed to have influenced the legislature.

If state and federal officers, as such, may exercise their functions within the jurisdiction of either government, to any extent, I see no principle by which their powers shall be limited. Such a course would blend the jurisdictions of the federal and state governments, and be likely to lead to the most serious collisions.

I consider this question as one of great importance, and differing, as I do, from the opinion of the court, I have felt bound to give the reasons for my opinion.

[United States v. Bailey.]

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Kentucky, and on the point on which the judges of the said circuit court were opposed in opinion, and which was certified to this court for its opinion, agreeably to the act of congress in such case made and provided, and was argued by counsel on consideration whereof, it is ordered and adjudged by this court, that it be certified to the said circuit court, as the opinion of this court, that the said Josiah Reed, named in the certificate of division, being a justice of the peace of the commonwealth of Kentucky, authorized by the laws of that state to administer oaths, had authority and jurisdiction to administer the oath and take the affidavit in the said certificate of division mentioned, and that if the facts stated therein were falsely sworn to, the case is within the act of congress of the 1st day of March 1823, referred to in the same certificate.